IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-358

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

KING BROWN,

Respondent.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Respondent herein respectfully applies for leave to proceed in forma pauperis in connection with the filing of his brief in opposition to the petition for a writ of certiorari. Counsel's affidavit in support of the within application is annexed hereto.

Dated: September 22, 1976
New York, New York

Respectfully submitted,

WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420
Attorney for Respondent

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WILLIAM E. HELLERSTEIN, being duly sworn, deposes and says:

I have represented respondent throughout the prior proceedings in the courtsof New York and make this affidavit in support of the within application to proceed in forma pauperis in connection with the filing of the brief in opposition to the petition for a writ of certiorari.

Respondent, King Brown, has declined to execute an affidavit attesting to his indigency for reasons unrelated to a change in his financial status. He is presently at the Rikers Island (N.Y.) House of Detention, awaiting sentencing on another charge.

As his counsel below, it is my firm belief that the People's petition for a writ of certiorari requires a response. That respondent has declined to execute an affidavit should not require this office to incur the costs of printing our brief in opposition. We have no basis for concluding that respondent's financial situation has improved since the entry of the judgment of the New York Court of Appeals.

WHEREFORE, it is respectfully requested that the application for leave to proceed in forma pauperis be granted.

William E. Hellerstein
WILLIAM E. HELLERSTEIN

Sworn to before me this
19th day of September, 1976.

Allen E. Burns
ALLEN E. BURNS
Notary Public, State of New York
No. 31-5536040
Qualified in New York County
Commission Expires March 30 1977

ORIGINAL

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM E. HELLERSTEIN
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SUSAN E. HOFKIN
Of Counsel

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OPINIONS BELOW

The opinion of the New York Court of Appeals (Appendix E of the Petition) is not yet officially reported. The opinion of the Supreme Court of the State of New York, Appellate Division, First Department (Appendix D of the Petition) is reported at 48 A.D. 2d 95, 368 N.Y.S. 2d 171 (1975). The opinion of the Hon. Harold Birns, a Justice of the Supreme Court of the State of New York, New York County (Appendix C of the Petition) is not officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.*

*We would note, however, that the New York Court of Appeals' decision specifically adverted to the double jeopardy clause of the New York State Constitution (Art. 1, §6). Given the court's extensive discussion of United States v. Wilson, 420 U.S. 332 (1975), United States v. Jenkins, 420 U.S. 358 (1975), and Serfass v. United States, 420 U.S. 377 (1975), we do not feel equipped to argue that the judgment below rests upon an independent and adequate state ground. Nonetheless, we feel obligated to alert this Court to the reference to the state Constitution. See California v. Krivda, 409 U.S. 33 (1972).

QUESTION PRESENTED

Whether the double jeopardy clause of the federal Constitution bars the state from appealing a trial judge's pre-verdict order granting the defendant's timely and necessary motion to dismiss the indictment for failure of the prosecution to prove a prima facie case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth in the Petition, the following provision of Art. 1, §6 of the New York Constitution is involved:

> No person shall be subject to be twice put in jeopardy for the same offense.

STATEMENT OF THE CASE

By a felony complaint, respondent was charged with bribery under P.L. (former) §200.00,* and a preliminary hearing was held on February 21, 1973 before the Hon. Milton Samorodin, a judge of the Criminal Court of the City of New York, New York County. At the hearing, police officer Timothy Stewart asserted that on February 20, 1973 respondent twice offered to give him money if he would release from custody a friend of respondent's. Prior to respondent's second offer, he asked Stewart "what are we going to do;" the officer answered, "that is up to you" (minutes of preliminary hearing, pages 10-13, annexed hereto as Appendix A). At the conclusion of the hearing defense counsel's motion to dismiss the charge on the ground of entrapment was denied, and the case was referred to the Grand Jury which indicted respondent on March 20, 1973.

Defense counsel again moved to dismiss the charge on April 1, 1974, claiming that the indictment was defective on its face and that respondent had been denied due process. On April 3, 1974 Mr. Justice Birns, who presided at the trial, denied the motion. The jury was then selected.

Officer Stewart's trial testimony was similar to that at the preliminary hearing, except that he did not recount his conversation with respondent which preceded the second offer of money.**

*The statute, set forth at page 4 of the Petition, was amended on September 1, 1973, becoming bribery in the second degree.

**Nor did the officer relate this conversation to the Grand Jury.

At the close of the People's case, defense counsel moved for a trial order of dismissal in accordance with C.P.L. §290.10(1), basing his argument on "certain things" that were stated during a discussion he and the prosecutor had with Mr. Justice Birns concerning the bribery statute. The judge then dismissed the indictment on the grounds urged by counsel, i.e. that a prima facie case of bribery had not been established because the "agreement or understanding" element of the crime required proof either that the officer agreed with respondent or led respondent to understand that the officer's conduct would be influenced upon receiving the money (trial minutes, pages 115-19, 121, annexed hereto as Appendix B).

Pursuant to C.P.L. §450.20(2)(which purports to authorize state appeals from trial orders of dismissal), the People attempted to appeal Mr. Justice Birns's order to the Supreme Court of the State of New York, Appellate Division, First Department. That court, relying on United States v. Wilson, 420 U.S. 332 (1975), and United States v. Jenkins, 420 U.S. 358 (1975), unanimously dismissed the appeal, holding that it was barred by the double jeopardy clauses of the federal and New York Constitutions. In dictum, four of the five justices expressed disagreement with Mr. Justice Birns's interpretation of the bribery statute. The fifth, Mr. Justice Nunez, opined that the trial court's interpretation was correct.*

The New York Court of Appeals, also relying on Wilson and Jenkins and, in addition, on Serfass v. United States, 420 U.S. 377 (1975), affirmed the Appellate Division's order and held C.P.L. §450.20(2) violative of the double jeopardy clause of both the federal and state Constitutions. The court of appeals expressly declined to rule on the correctness of Mr. Justice Birns's trial order of dismissal (Pet. App. at 17a). Nor did the court of appeals pass on the state's argument, raised for the first time in that court, that respondent purposely waited until jeopardy had attached to move for dismissal of the indictment for insufficient evidence.

*Prompted by Mr. Justice Nunez's approval of the propriety of the trial order of dismissal, the Advisory Committee on New York's Criminal Procedure Law has recommended that the "agreement or understanding" element of the bribery statute be amended to read "with the intent to influence." Fifth Annual Report to the Judicial Conference of the State of New York, pp. 42-4 (Jan. 9, 1976).

REASONS FOR DENYING THE WRIT

I. The decision below is correct.

The New York Court of Appeals affirmed the Appellate Division's dismissal of the People's appeal and held C.P.L. §450.20(2) violative of the state and federal Constitutions' double jeopardy clauses because, as in United States v. Jenkins, 420 U.S. 358, 370 (1975), "further proceedings of some sort devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand" (Pet. App. at 14a). Regardless of whether the court of appeals characterized its holding as based on a "mechanical rule", this "rule" did not, contrary to petitioner's argument (Pet. at 12-21), constitute novel double jeopardy law. Rather, the decision, which rested solely on the clause's prohibition against multiple prosecutions, was consonant with the analysis of United States v. Jenkins, supra, United States v. Wilson, 420 U.S. 332 (1975), and Serfass v. United States, 420 U.S. 377 (1975).

A.

Petitioner argues that before a prosecution appeal will be barred under the Wilson-Jenkins-Serfass trilogy, the multiple trial principle must be augmented by one of three additional factors, and that none of these extra factors was involved in this case. Petitioner asserts that these factors are: prosecutorial abuse at the first trial, a reason for terminating the first trial which did not defeat "the ends of justice," and, "most important", an acquittal on the merits at the first trial (Pet. at 13-7). Nothing in Wilson, Jenkins, or Serfass, however, supports this "extra factor test."

First, none of these cases involved an issue of prosecutorial misconduct. Second, in none did this Court even pause to evaluate whether the reasons for terminating the defendants' trials were proper. Indeed, the Court in Jenkins explicitly noted the irrelevancy of the correctness vel non of the district court's legal theory underlying the dismissal of the indictment. 420 U.S. at 365 n. 7.* Third, none of the cases involved an acquittal on the merits by the finder of fact: In Wilson, the defendant was convicted by the jury (420 U.S. at

*While petitioner assumes otherwise, Justice Birns's legal ruling in respondent's case has not been conclusively held erroneous.

333); in Jenkins, the district judge did not render a verdict of any sort (420 U.S. at 367); and in Serfass, jeopardy had not even attached (420 U.S. at 389).

Thus, without concrete support in Wilson, Jenkins, or Serfass for his "extra factor test," petitioner attaches significance to this Court's refusal to pass upon Wilson's contention that he was acquitted (Pet. at 18). By ascribing to an acquittal "talismanic quality", this argument does precisely what this Court cautioned against in Serfass. 420 U.S. at 392. The reason this Court did not consider Wilson's claim of acquittal is apparent: Acquittals bar retrial only if and solely because the double jeopardy clause's policy against multiple prosecutions would be offended--and this policy was not implicated in Wilson. 420 U.S. at 346-48.

Similarly, with Jenkins, petitioner suggests that there "might have been" an acquittal because of this Court's statements about the "uncertain" basis for the district judge's dismissal of the indictment (Pet. at 19-20). The "uncertainty", however, related only to the government's claim that Jenkins actually had been found guilty. And, upon rejecting the government's argument, this Court found it unnecessary, for double jeopardy purposes, to resolve whether Jenkins had been acquitted on the merits. 420 U.S. at 367-68, 370.

Finally, petitioner thinks it important that the Serfass Court refused to decide whether the dismissal of the indictment would have been appealable had jeopardy attached (Pet. at 21). Whatever the Court's reasons prompting this language, it was not tantamount to an overruling of Jenkins, decided only six days previously.

B.

Petitioner also argues that the decision below may have been wrong because respondent deliberately withheld his motion to dismiss for insufficient evidence until jeopardy had attached (Pet. at 12, 17, 21, 28). This accusation, which seeks to bring respondent within the ambit of the dictum in Serfass concerning the "knowing" deferral of motions to dismiss (420 U.S. at 394), was made by the state for the first time in the New York Court of Appeals. Contrary to petitioner's conclusion that the instant case presents this Serfass issue "as clearly as any case is likely to do" (Pet. at 12, 28), the court below had good reason for ignoring the state's accusation.

The record is barren of any evidence that counsel wilfully delayed seeking the dismissal of the indictment until jeopardy had attached. Rather, it affirmatively demonstrates that the defense, well before jeopardy had attached, actively sought dismissal. Specifically, on both February 21, 1973 and April 1, 1974 motions to dismiss the charge were made on a number of grounds. That the precise argument of insufficiency of evidence as to the "agreement or understanding" element of bribery was not made until trial, without more, cannot be deemed purposeful, given the total effort made by the defense to gain a pretrial dismissal of the charge. That neither the prosecutor at trial nor on appeal to the Appellate Division made such a charge against counsel renders its baselessness apparent. If anything, the record supports the favorable inference that counsel thought he lacked grounds for the insufficiency of evidence motion--for Stewart's preliminary hearing testimony, "That is up to you," not repeated at trial, easily could be construed as having established his agreement to act on respondent's behalf. Indeed, it appears from counsel's prefatory statement to his motion for the trial order of dismissal that he developed the "agreement or understanding" argument, possibly with guidance from Mr. Justice Birns, only after the People presented its case.

Counsel's conduct in this case thus bore no resemblance to that of counsel in United States v. Kehoe, 516 F. 2d 78 (5th Cir. 1975), cert. denied, 96 S. Ct. 1103 (1976), reh. denied, 96 S. Ct. 1687 (1976), the decision on which petitioner relies (Pet. at 28). In Kehoe, the defendant's attorney explicitly admitted that he withheld his motion to dismiss the indictment for facial defects--a motion which certainly could have been made prior to trial--until mid-trial so that he could view the government's case. 516 F. 2d at 80, 86. Here, counsel evinced no such intent to manipulate the judicial system--the motivation to which the Serfass dictum was obviously addressed.

C.

Petitioner further asserts that regardless of the timing of the motion to dismiss, the decision below may have been incorrect simply because respondent made the motion and thus "caused the case to be taken from the first jury" (Pet. at 14-5, 17). For this proposition, petitioner posits an analogy to United States v. Dinitz, 96 S. Ct. 1075 (1976), in which this Court upheld the constitutionality of the retrial of a defendant who aborted his first trial by requesting and securing a mistrial. Petitioner's contention--a thinly disguised waiver argument--is without merit.

First, there is no language in Wilson, Jenkins, or Serfass indicating it of any moment whether the defendants in those cases moved to dismiss the indictments.

Second, the mistrial analogy is inapt. As the Dinitz Court noted, the reason for permitting reprosecution of a defendant who affirmatively secures a mistrial is that he is deemed to have "retain[ed] primary control" over the decision not to continue with the first trial and to have another. 96 S. Ct. at 1081. Here, respondent requested that the trial be terminated in his favor. Had the trial court not dismissed the indictment he would have been required to proceed with the trial. Thus, respondent did not even express a desire to have a second trial, much less "control" whether another would be ordered.

Third, under New York law at the time of trial, had respondent not moved for the trial order of dismissal and been convicted, he may well have been precluded from raising the sufficiency of evidence point on appeal in the Appellate Division [see C.P.L. §470.15(4)(b), (6)(a)] and definitely would have been precluded from raising it in the court of appeals. People v. Thomas, 36 N.Y. 2d 514, 516-17, 330 N.E. 2d 609, 610, 369 N.Y.S. 2d 645, 647-48 (1975). Nothing in the record remotely suggests that by properly preserving an issue for purposes of appeal in the event of his conviction respondent thereby effected a voluntary and intelligent waiver of his constitutional right not to be twice placed in jeopardy. See Green v. United States, 355 U.S. 184, 191-92 (1957).

II. There is no conflict of decisional law requiring resolution by this Court.

Petitioner claims that there is "confusion" and "dispute" among lower courts concerning the interpretation of Wilson, Jenkins, and Serfass, and that the problem is exacerbated by Illinois v. Somerville, 410 U.S. 458 (1973), in which this Court permitted the retrial of a defendant whose first trial ended in a mistrial due to a defective indictment (Pet. at 20-4, 27). However much "confusion" petitioner imagines may exist and despite the many jurisdictions with statutes purporting to allow appeals by the prosecution (Pet. at 25-7), he has not cited, and we cannot find, even one lower court decision which conflicts with the decision below.

In fact, United States v. Robbins, 510 F. 2d 301 (6th Cir. 1975), cert. denied, 44 U.S.L.W. 3397 (Jan. 12, 1976), a citation notably absent from the petition, involved the identical double jeopardy issue as this case and reached the same result as the New York Court of Appeals. There, the court held that the double jeopardy clause barred the government's appeal from the district court's order granting Robbins's motion to dismiss the indictment for insufficient evidence at the close of the government's case. And, the government's double jeopardy analysis in its petition for a writ of certiorari was no different from that in the petition here. See Government's Petition for a Writ of Certiorari, No. 75-67, pp. 6-19.

Petitioner cites five cases which he claims disallowed government appeals only upon findings that the defendants may have been acquitted (Pet. at 22). These decisions, however, are actually in harmony with the decision below. State v. Lewis, 96 Idaho 743, 536 P. 2d 738 (1975), is essentially the same as the case at bar. The judge at Lewis's jury trial dismissed the indictment for insufficient evidence on the defendant's motion at the close of the prosecution's case. 96 Idaho at 745, 747; 536 P. 2d at 740, 742. As in New York, Idaho law gave only the jury power to determine the credibility of the proof. 96 Idaho at 748; 536 P. 2d at 743. In short, Lewis was no more acquitted on the merits than was respondent. The Idaho Supreme Court merely stated that "for double jeopardy purposes" Lewis was deemed acquitted. 96 Idaho at 750-51; 536 P. 2d at 745-46.

In the four federal cases cited, the characterizations of the respective dismissals of the indictments as acquittals were also purely formalistic. The appeals were barred solely because of the Jenkins criterion of "further proceedings" [United States v. Martin Linen Supply Co., 534 F. 2d 585, 586, 588-89 (5th Cir. 1976), petition for cert. filed July 27, 1976 (No. 76-120); United States v. Patrick, 532 F. 2d 142, 143, 147 (9th Cir. 1976); United States v. Fayer, 523 F. 2d 661, 663-64 (2nd Cir. 1975); United States v. Lucido, 517 F. 2d 1, 3 (6th Cir. 1975)].

Several of the other cases cited do not even present the same issue as here. Specifically, four cases, relying on Illinois v. Somerville, supra, permitted government appeals or retrials following mid-trial dismissals of facially defective indictments [United States v. Lee, ___F. 2d___ (7th Cir. 1976); United States v. DiSilvio, 520 F. 2d 247 (3rd Cir. 1975), cert. denied, 96 S. Ct. 447 (1975); United States v. Kehoe, supra; State v. Russo, 70 Wisc. 2d 169, 233 N.W. 2d 485 (1975)](Pet. at 20-2).

And, in United States v. Sedgwick, 345 A. 2d 465 (D.C. Ct. App. 1975), the mistrial issue clouded the question of whether the subsequent dismissal of the indictment barred the appeal. Indeed, the opinion focused exclusively on the propriety of the trial judge's granting of the mistrial rather than on his dismissal of the indictment.* 345 A. 2d at 468-73. Thus, the Sedgwick opinion belies petitioner's assertion that an appeal and retrial would have been allowed absent the declaration of the mistrial (Pet. at 22 n. 10).

Finally, whatever significance petitioner may attribute to United States v. Sanford, 503 F. 2d 291 (9th Cir. 1974), vacated and remanded, 421 U.S. 996 (1975), on remand, ___F. 2d ___ (May 27, 1976), and the three Tenth Circuit Court of Appeals' cases [United States v. Morrison, United States v. Rose, United States v. Kopp (1975), petitions for cert. filed April 23, 1976, Nos. 75-1534, 1535, 1536](Pet. at 23-4), these decisions raised issues which simply are

*It is perhaps not insignificant that the appeal in Sedgwick was argued a few weeks prior to this Court's decisions in Wilson, Jenkins, and Serfass (see 345 A. 2d at 465), and that defense counsel on appeal apparently argued only that the mistrial was not manifestly necessary (345 A. 2d at 468).

not in dispute in the case at bar. As the facts of Sanford make plain, the pivotal issue there was whether jeopardy had attached at the time the indictment was dismissed. And in the three other decisions, the obvious question was whether they were directly controlled by Wilson.

In sum, there is no conflict among the lower courts as to the issue presented in this case. Absent a conflict, petitioner's lengthy discussion of numerous statutes in various jurisdictions allowing government appeals is irrelevant.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Attorney for Respondent

SUSAN E. HOFKIN
Of Counsel
September, 1976

APPENDIX A

MINUTES OF PRELIMINARY HEARING, PAGES 10-13

PRELIMINARY HEARING

THE COURT: Sustained.

Q Was Patrolman O'Connor the only other officer present, at the second conversation?

A Yes sir, he was.

Q Who was wired at that conversation?

A I --

MR. ORTIZ: Objection.

THE COURT: Sustained.

Q What was said at that conversation?

A The defendant stated to me, that he was willing to pay 75 or 100 Dollars, to have all the charges dropped against the defendant Rodriguez.

Q When you went in the room for the second conversation, who was the first one to speak?

MR. ORTIZ: Objection.

THE COURT: Overruled.

A The defendant was.

Q What was your response to his statement?

A What was my response to his statement?

Q That is right.

PRELIMINARY HEARING

A The defendant asked me something. I said, I would be with you in a minute.

THE COURT: What did the defendant ask you?

THE WITNESS: He asked me, if he could leave.

THE COURT: Which defendant are you referring to?

THE WITNESS: Referring to Mr. Brown. Mr. Brown asked me, if he could leave.

THE COURT: Were those his first words to you?

THE WITNESS: Yes.

Q What did you say?

A I said, just a minute.

THE COURT: Was that what he said to you before he asked what he told you, he would like to have his friend, Mr. Rodriguez freed?

PRELIMINARY HEARING

THE WITNESS: No, this is regarding the second conversation. This is after he had already stated to me, that he wished to have his friend freed, and offered me the sum of 75 to 100 Dollars.

Q And then you told Mr. Brown that he could not leave, is that correct?

A I never told Mr. Brown he could not leave at all.

Q When he said, could he leave?

A I said, just a minute. I will be with you in a minute.

Q What happened after a minute was over?

A Patrolman O'Connor then walked into the room, and Mr. Brown said, what are we going to do?

Q What was your response?

A I said, that is up to you.

Q What did Patrolman O'Connor say, during this time?

MR. ORTIZ: Objection.

PRELIMINARY HEARING

THE COURT: Sustained.

Q You said, that is up to you, and what was said next?

A I don't remember verbatim, what the actual exchange of words were.

Q What do you remember?

A I remember the defendant again stating, that he wished to have his friend freed of all charges, and he is willing to pay 75 to 100 Dollars.

Q Did he state, who this payment was to be made to?

A I don't remember.

Q Do you remember if he ever stated, that he would be willing to pay the auto company, for any amount for which the car was overdue, and which was owed to the auto company, which was involved in Mr. Rodriguez's case?

A No sir, the initial conversation the defendant said, he wished to give me 75 to 100 Dollars.

Q Did there come a time, at which you searched my client?

APPENDIX B

MINUTES OF TRIAL, PAGES 115-19, 121

to me I heard.

THE COURT: There were sounds and words that you were unable to put down on the transcript?

THE WITNESS: Yes, sir.

BY MR. LEVINE:

Q When you made the transcript from the duplicate copy did you hear on that copy of the tape the words, "keep it from getting before the Judge?"

A No, sir, I did not.

Q Do you remember these words being said in the actual conversation?

A Yes, sir, I do.

Q And, what did you hear when you made the duplicate copy and made the transcript that did you hear?

THE COURT: Objection sustained.

Q What did you transcribe?

THE COURT: You have the transcript before you but the transcript is not in evidence.

Q I'll withdraw that question.

THE COURT: It is for the jury to determine from this tape what was said and that's really the best evidence in the case as compared to the transcript and that's what I pointed out to the jury. If at any time the jury wants it replayed, I will

be glad to replay it.

BY MR. LEVINE:

Q Detective Stewart, have you prior to today in Court heard the original tape, People's 4 hear it other than here in Court?

A Yes, sir, in the sound room of the district attorney office.

Q Is that a specially designed or accoustics sound room?

MR. ROSENBLOOM: objection, your Honor.

THE COURT: Sustained.

Q When you heard it made in the sound room of the district attorney's office on the original tape, did you then hear the words, "keep it from getting in front of the Judge?"

MR. ROSENBLOOM: Objection.

THE COURT: Sustained.

Q When you heard the original tape--

THE COURT: What is heard on any other occasion is really irrelevant. It is for this jury to use from the evidence of what is heard in this courtroom that the conversation was and what was heard by any of the parties--any of the participating parties.

Q When you heard the original tape in the distric

attorney's office sound room had you already heard the tape, People's 2 for identification, at that time?

A Yes, sir, I have.

THE COURT: You have cross examination in front of you, is that correct?

THE WITNESS: Yes.

THE COURT: I have some other matters which is going to require most of the afternoon before me and I think under these circumstances it wouldn't be fair to have you sit around for two and half hours, so under these circumstances I will excuse you until tomorrow morning at 10 o'clock.

Bear in mind my admonitions, do not discuss the case, permit no one to discuss the matter with you. Form no opinion about the case until submitted to you.

Tomorrow morning at 10 o'clock, please.

(Thereupon the jury is excused for the day.)

MR. LEVINE: I would like to turn over the rosario material.

THE COURT: There is an endorsement on the papers that you are to go right back to the Tombs, Mr. Brown.

THE DEFENDANT: Thank you.

MR. LEVINE: I wish the record to reflect I am giving Mr. Rosenbloom the two applicable pages of Detective Stewart's memorandum book, photo copies a copy of the arrest report of Angel Rodriguez, a copy of the arrest report of the defendant, a copy of the UF 61 with respect to the defendant, four papers that have been previously marked for identification respecting Officer Sevalli and the grand jury minutes of Detective Stewart. I believe Mr. Rosenbloom has a copy of the Criminal Court minutes.

THE COURT: You will have to hand these papers on at a time to Miss Benjamin for proper endorsement. What is the first paper

People's 6, grand jury minutes, for identification.

People's 7, UF 61, arrest of King Brown, for identification.

People's 8, P.D. 244 arrest report, for identification.

People's 9, photo copy arrest report of Angel Rodriguez.

People's 10 pages 22, 23 photostat copies of pages of memo book.

(Thereupon the above mentioned documents were marked accordingly for identification.

MR. ROSENBLOOM: Do you have any notes or memorandum made by yourself in conversation of any of the witnesses?

MR. LEVINE: I have turned over all rosario material in possession of the People, your Honor.

- - - -

we do the best we can under the circumstances. We are ready to proceed, now.

MR. LEVINE: Yes, your Honor.

MR. ROSENBLOOM: Yes, sir.

THE COURT: I am sorry for this equipment that is blocking out Juror No. 6 or the first alternate but I will move around so you can see I'm here.

Would you come up Mr. Stewart, please.

THE CLERK: Detective Timothy Stewart resumes now under cross examination.

THE COURT: All right, Mr. Rosenbloom, lets go.

CROSS EXAMINATION

BY MR. ROSENBLOOM:

Q Detective Stewart how long have you been a detective?

A Since December of 1973.

Q That's approximately ten months after this arrest, correct?

A That's correct.

Q And, did you have an opportunity to testify in Criminal Court, Part A P 6?

THE COURT: You mean did he testify?

MR. ROSENBLOOM: Yes,

Q Did you testify in Part A P 6?